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## Tom Morawetz's "Robust Enterprise": Jurisprudence after Wittgenstein

Thomas D. Eisele, *\*University of Cincinnati*

"One can agree with Wittgenstein about philosophy or 'theory' and yet find it to be a fairly robust enterprise. The ways in which we are oblivious or unselfconscious about our practices can be considerable and can lead us to make odd and misleading claims. To the extent that moves within the practice *include* reflections about the practice, theory does not stand apart from but is included within it."

— Thomas Morawetz, *Law's Premises, Law's Promise*<sup>1</sup>

The formula for giving a critical reading of someone's work is depressingly familiar:<sup>2</sup> the commentator gets up, says a few kind (even flattering) words about the other person's work, and then proceeds to tear it apart, all the while professing to like or admire the aforementioned demolished writing. I shall try, in what follows, to contest the hold that this professional formula seems to have on critical proceedings such as this.

I begin by examining at length one theme in Tom Morawetz's work – a theme stemming from Wittgenstein's later work – that I find both admirable and troublesome. Having examined some of the details of this theme, I then go on to draw our attention to what seems to me to be a different way to approach jurisprudential matters, while still proceeding within the example or inspiration set out in Wittgenstein's later philosophy. This second way of working I find missing or neglected in Tom Morawetz's work (at least as that work is represented by the selection of articles reprinted in the particular

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1. Thomas Morawetz, *Law's Premises, Law's Promise: Jurisprudence After Wittgenstein* (Ashgate Publishing, 2000), 234 [hereinafter cited as "LPLP"].

2. My friend, Lash LaRue, has an apt characterisation of this critical formula – which he too disdains to follow – at the beginning of his article on John Marshall's judicial style: see Lewis Henry LaRue, "How Not to Imitate John Marshall," 56 Wash. & Lee L. Rev. 819, 819 (1999).

book under discussion). In a third and final section of my commentary, I employ this alternative method to provide, ever so briefly, an example of how a Wittgensteinian approach might be made towards explicating and understanding a classic claim in jurisprudence regarding the need to separate legal and moral concepts, a claim initiated in 1897 in Holmes' lecture, "The Path of the Law."

### I. Law as an Open, Deliberative Practice

Limiting my comments to the first part of the book, the section entitled "Essays in Analytical Jurisprudence," which constitutes more than two-thirds of the entire text, I find the concept of a practice to be most at work thematically in Morawetz's jurisprudential descriptions and reflections. Other than the concept of law itself, no concept receives more attention in this stretch of writing than that of a practice.

In the first two essays in the book, Morawetz elicits three different kinds of practice:

(1) First, there are what Morawetz calls "closed practices," which are defined by their constitutive rules. These rules define the moves or actions available in a given closed practice, and taken together they define or constitute exhaustively not only the available actions within a closed practice, but also all of the anticipated situations covered by that practice.<sup>3</sup> In addition, Morawetz says, while the point of each such closed practice may not be expressed by or otherwise stated in those definitive rules,<sup>4</sup> still, any observer of a closed practice, or any participant in a closed practice, can infer the point of the practice from a consideration of its constitutive or defining rules. "The specification of the rules of chess or baseball is at the same time the specification of the point of the game. . . ."<sup>5</sup> Closed prac-

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3. See LPLP, pp. 4, 6. See also p. 27: "Only a finite variety of situations can arise in games, and the rules of games anticipate all possible moves in all possible situations."

4. See LPLP, pp. 8, 22–23.

5. LPLP, p. 8. The elliptical dots in this quotation delete an important qualifying phrase from Morawetz: he makes this claim "*in this sense*" – namely, that the defining or constitutive rules of a game indicate the point of that game *if* we are seeking to understand some move within the game that we believe requires explanation or justification. Issues of strategy in playing a game, then, can serve to elicit the "point" of the game in the sense meant or intended by Morawetz. Participants of games may,

tices in Morawetz's terms are exemplified by games (e.g. chess, baseball). To participate in the game of chess, to play baseball, according to Morawetz, is to be cognizant of – even, perhaps, to be conversant with – each game's constitutive rules. If one is not initiated into the rules of chess or rules of baseball, then he or she is not an initiate of this particular form of human action or activity, this particular human practice. To play chess or to play baseball, one must know the rules of the game. “[T]he constitutive rules of a game are the rules which an individual must learn before he can be a participant in the game. (In other words, to regard someone as a participant is to regard him as having learned or in some way mastered the constitutive rules.)”<sup>6</sup> This does not mean that a player needs to study the rules of the game or explicitly commit them to memory; but, unless the player has at least an implicit sense of the rules, he or she will not be able to play the game – will not be able to participate, will not be able to perform, will not be able to play as the game is meant or intended to be played.

(2) This last point is not the case with the second group or class of practices, which Morawetz calls “open” practices. A person can participate in an open practice without knowing its rules.

Here Morawetz appeals to phenomena such as specific languages and various legal systems as examples of open practices. According to Morawetz, while such practices involve rules – because there are right and wrong ways to do things within law or in speaking a language (just as in closed practices) – in contradistinction to closed practices, these “rules” do not define or constitute practices when these rule-bound or rule-governed practices are “open” ones. As Morawetz puts it, “[R]ules are not constitutive of moves within law as they are of moves within closed practices.”<sup>7</sup> Thus, along these lines, Morawetz finds himself asking: “Are there any constitutive rules for

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however, have other reasons – reasons extraneous to the game itself – for playing, in which case the “point” of the activity or exercise will not be stated or implied by the game's constitutive or defining rules. (This equivocation on the meaning of the “point” of a game is why Morawetz later says, “The question, ‘What is the point of the game,’ is ambiguous.” LPLP, p. 22.)

6. LPLP, p. 20.

7. LPLP, p. 7. See also p. 27: “Men communicate in infinite and infinitely varied situations, and men seek social order in infinite and varied situations. . . . [Thus,] the rules of a language or a legal system . . . cannot be formulated once, for all. A language or a legal system cannot have constitutive rules in the sense in which a game does.”

English or, alternatively, for the American legal system?"<sup>8</sup> And he suggests that a person does not often become an initiate of an open practice by learning the rules of such a practice: "becoming a user of English (learning English) may not be a matter of learning rules at all, but a matter of acquiring a way of behaving."<sup>9</sup>

For Morawetz, this fact about open practices means two things: first, the rules involved in open practices have a quality that (borrowing from H. L. A. Hart) Morawetz calls their "open texture."<sup>10</sup> "Rules of law have open texture if no statement of them can anticipate every possible problematic application. Similarly, no statement of the rules of English can be anything but an approximation of usage."<sup>11</sup> Second, a related feature of open practices is that such practices can be, or are, subject to change. They evolve or develop, in part of course because their rules have an open texture (have a penumbra, if you will); but also because the application of the rules involved in such open practices is itself always "open" to change by redefinition or reconstitution of the practice itself. "The suggestion here is that in practices of the second kind rules codify and structure the actual practice, but no set of rules is definitive or constitutive of the practice. In these [open] practices, and not in games [i.e. closed practices], the practice evolves, the rules change, through the participation of the participants themselves. . . . The rules of practices of the second kind are in a sense malleable and change with usage."<sup>12</sup>

There seems, then, to be a dynamic feature to open practices, which feature is not shared by closed practices. Thus, Morawetz says that, "[i]n spite of all the differences between language and law as practices, they are alike in that they are both in a sense organic, as games are not. Moves [in open practices such as law and language] that are made within the practice have the power to erode the rules of the practice."<sup>13</sup> Changing his image from organic to mechanical somewhat, Morawetz then goes on to say that "games cannot be seen as tools whereas law and language can be seen as tools."<sup>14</sup> And this

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8 LPLP, p. 24.

9. LPLP, p. 24.

10. See, e.g. LPLP, pp. 5, 6, 21, 27.

11. LPLP, p. 5.

12. LPLP, p. 25.

13. LPLP, p. 26.

14. LPLP, pp. 26–27.

series of facts leads Morawetz to formulate a basic difference between open practices and closed practices with respect to the “point” of each such practice:

To ask, therefore, for the point of a practice of the second kind is to make a different kind of inquiry than to ask the point of a game. The point of a game is defined by a particular constitutive rule. There is no equivalent rule of usage for language which tells a player what constitutes final success. There can't be, because there is no final success in language. There is no notion of victory or defeat. For the point of language, we must ask what kind of tool it is, what job or jobs it does. Success is a matter of doing that job.<sup>15</sup>

What this shows, or suggests, is that open practices such as language and law may have (as a system, as a practice) a series of points, a variety of jobs, such that it is impossible to select one goal or one operation or one function and assert that *that* one is “the” point of the language or the legal system in question. Open practices are, in a variety of ways or on a series of levels, both more diverse and more complicated than closed practices.

(3) The third and final type of practice receives much less characterisation by Morawetz, but it acts as a kind of place-holder, reserving some space along one end of the conceptual continuum of practices that Morawetz sketches. About this third kind of practice or activity (which Morawetz hesitates “to call a ‘practice’ at all,”<sup>16</sup>), Morawetz says that it still has the feature of other practices, namely, that it is defined by rules, which give to the practice its structure. Morawetz variously describes this type of practice as “our thought about the world”<sup>17</sup> and as “the activity of being reasonable (or rational) or of understanding.”<sup>18</sup> In this vein, Morawetz offers the thought that, in seeking to explore and describe the structure of our actual thought about the world, we are undertaking a philosophical task, a philosophical activity. This task may or may not fit under such a grandiose name as once proffered by P. F. Strawson (“descriptive metaphysics”<sup>19</sup>); nonetheless, Morawetz recognises this philosophical activity as hailing from Wittgenstein's later work. So, despite

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15. LPLP, p. 29.

16. LPLP, p. 32.

17. LPLP, p. 33.

18. LPLP, p. 33.

19. LPLP, p. 33.

Morawetz's obvious discomfort with placing this phenomenon, he finds himself making room for it on his conceptual continuum:

To call the activity in question "our thought about the world" and the search for its rules "metaphysics" or (perhaps) "philosophy," is to explain my hesitation about calling the activity a "practice." I don't know what it would mean to ask whether the rules are arbitrary, or what the point of the practice is. And yet, what Wittgenstein calls "the basis of action, and therefore, naturally, of thought" is a basis within which practices properly so-called exist.<sup>20</sup>

Having sketched briefly (and, I am afraid, crudely) Morawetz's carefully modulated descriptions of three kinds of practice, we might ask ourselves why this focus or concentration on the concept of a practice matters to Morawetz. What is the importance to Tom Morawetz of correctly describing and locating the notion of a practice? From my reading of *Law's Premises, Law's Promise*, I gather that Morawetz has three main reasons for focusing on the notion of a practice.

First, this focus allows Morawetz to show in a convincing way that the popularity (in post-Wittgenstein philosophical circles) of comparing various human practices and activities to games is a potentially dangerous and misleading way to look at these phenomena. From the cases and examples that Morawetz examines in the early essays of this book, and from the descriptions that he subsequently builds, he is able to draw the conclusion that games are closed practices, whereas most of the phenomena that interest philosophers are properly placed within the second or third kind of practice (sketched above). Morawetz, for example, takes language to be an open practice, the rules of which play roles in the practice of language that are different from the role that rules play in a game. Similarly for law. Both law and language are open practices, which makes their kinship with closed practices (such as games) very distant indeed, claims Morawetz: "The game metaphor fails because it is not illuminating to view these characteristic ways of ordering experience as a matter of following rules."<sup>21</sup>

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20. LPLP, p. 33.

21. LPLP, p. 147. (The "characteristic ways of ordering experience" referred to here include, as "deliberative practices," both law and language – as well as a number of other human activities.) See also LPLP, p. 193: "[T]he game metaphor cannibalizes itself."

Another example of the dissimilarity between games (on the one hand) and law and language<sup>22</sup> (on the other hand), is the fact – emphasised by Morawetz several times throughout Part I of this book – that the “point” of the practice of law and the “point” of the practice of language are ambiguous or unknown (unlike the “point” of a game, or that of any other closed practice). So the point of any open practice is exactly that: open. It is subject to discussion, debate and disagreement. Morawetz suggests, in this respect, that the point of any open practice is inherently various or multifarious (or contestable, as W. B. Gallie once taught us, long ago, to say with regard to what he called “essentially contested concepts”<sup>23</sup>).

Morawetz’s detailed work with the nature and variety of practices allows him, then, to sketch the extent to which any attempt to invoke a Wittgensteinian “game” metaphor when discussing human activities is severely limited in its metaphorical power to clarify our vision or understanding of those human activities. “This [metaphor] is, as I shall argue, doubly misleading because Wittgenstein is not merely concerned with language and because his concern with discourse is not bounded by the metaphor of games.”<sup>24</sup> This point goes deeper in Morawetz’s writing than one initially might think, for it also touches upon the favored use of one of Wittgenstein’s most popular new terms of criticism, his critical term, “language–game” (*Sprachspiel*). As Morawetz delves deeper into the nature of practices and how we should describe and understand them, he becomes increasingly less sanguine about the apparent attempt by Wittgensteinians to reduce all human activities to the model of a congeries of “language–games.” For Morawetz, human practices are not reducible to linguistic phenomena, nor are they reducible to the model of games. “By focusing on the idea that practices are made up of shared linguistic rules, some followers of Wittgenstein imply that on–going practices are more homogeneous than they really are. It is important to remember how diverse [they] are. . . . . [new ¶]

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22. While Morawetz frequently contrasts law and language with closed practices such as games, he also (later in this collection) notes several respects in which law differs from language. (See LPLP, pp. 205–207.) So, although law and language are similar in certain ways as examples of open practices, it remains the case that, as Morawetz claims, “language is [or can be] a misleading model for law.” LPLP, p. 205.

23. W. B. Gallie, *Philosophy and the Historical Understanding*, 2nd edition (Schocken Books, 1968) pp. 157–191.

24. LPLP, p. 84.

Just as deliberative practices are not, or not merely or primarily, activities of language, so too they are not very much like games. Some similarities are obvious and explain the seductiveness of the metaphor.”<sup>25</sup>

Second, Morawetz’s focus on practices also allows him to develop his original description of law as an open practice, into a more nuanced description, one that casts law as a deliberative practice. Unlike his earlier work, where Morawetz gives us something closer to a definition of closed and open practices (or, at least, he supplies us with lists of their similar and dissimilar features), here Morawetz does not attempt to define “deliberative practices.” Rather, he begins with the idea that, among the variety of practices we know in human activity, there exist “more complex practices that involve deliberation.”<sup>26</sup> As examples of deliberative practices, Morawetz gives us the following list: “esthetic debate, moral reasoning, historical discourse, and judicial decision-making.”<sup>27</sup> Somewhat later, in a different essay, Morawetz provides us with a slightly different characterisation of deliberative practices: “A deliberative practice consists of discourse directed toward forming and defending judgments.”<sup>28</sup>

A deliberative practice seems to me to combine aspects of both the second and the third kinds of practice sketched in Morawetz’s earlier essays. To begin with, Morawetz states several times in his earlier essays that law is an open practice (i.e. type [2], above). Moreover, Morawetz places language in the same category (as a type [2] practice). Because he also says that a deliberative practice “consists of discourse” (entailing that such a practice must proceed within language), it seems plausible to me that deliberative practices are open practices. And, finally, Morawetz begins his discussion of judicial decision making as a deliberative practice by once again making the case against the too-close identification of law with games: “Practices are not games.”<sup>29</sup> And: “The behavior of judges does not fit the metaphor of games.”<sup>30</sup> This is the same move that Morawetz made earlier when he distinguished open practices from closed prac-

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25. LPLP, p. 92.

26. LPLP, p. 88.

27. LPLP, p. 89. See also p. 136: “Examples of deliberative practices are esthetic debate, moral reasoning, discussions about history, and judicial decision-making.”

28. LPLP, p. 136.

29. LPLP, p. 93.

30. LPLP, p. 99.

tices. These are, then, some of the reasons why we might catalogue what Morawetz calls “deliberative practices” as type (2) practices (i.e. open practices).

But wait. Morawetz goes on from here to complicate his idea of a deliberative practice, and to suggest that perhaps deliberative practices also share aspects of what we earlier had called type (3) practices (above). For example, Morawetz says that “in deliberative practices justificatory moves proceed in the face of differing strategies of reasoning. The practice consists in the recognition that these differing strategies exist and compete.”<sup>31</sup> He also says that, “for deliberative practices[, . . .] [t]he patterns of reasoning involved in forming and justifying judgments are patterns expressed in language and described through language. But the intellectual strategy that leads someone to explain social and economic phenomena by reducing them to patterns of individual psychology is not adequately described by rules that instruct one in the use of words.”<sup>32</sup> And: “But a way of thinking and experiencing is not a set of rules. It is an evolving way of thinking, a way of proceeding in which one has a stake and from which one can abstract oneself only provisionally, only tentatively.”<sup>33</sup>

These last two remarks put a decidedly non-linguistic stamp on these patterns of reasoning, a stamp meant (I believe) to emphasise their basis in our intellect (our “individual psychology”), and thus to tie them with Morawetz’s earlier characterisation of type (3) practices as “what Wittgenstein calls ‘the basis of action, and therefore, naturally, of thought,’” all of which Morawetz takes to be a basis within which practices properly so-called exist (see text at note 20, *supra*).

Given that Morawetz is appealing to “differing strategies of reasoning” as a constitutive component of deliberative practices, and that his repeated examples of deliberative practices are “esthetic debate, moral reasoning, historical discourse, and judicial decision-making,” I am led to believe that deliberative practices share certain characteristics with what Morawetz earlier identified as type (3) practices. Remember, Morawetz previously said (see text at notes 17 and 18, *supra*) that this type of practice was “our thought about the world”;

31. LPLP, p. 94.

32. LPLP, p. 92.

33. LPLP, p. 148.

and also that it resembled “the activity of being reasonable (or rational) or of understanding.” In this respect, then, because Morawetz cites various activities of reasoning, or strategies of reasoning, as being deliberative practices, I am inclined to think that deliberative practices are (at least in part) the third kind of practice that Morawetz described in his earlier work.

All of this is difficult to be clear about, of course, and Morawetz’s obscurity in this respect is not wilful: it is in the nature of the beast he is trying to describe and analyze. Here he is breaking new ground. “Wittgenstein does not give an account of deliberative practices. His examples of practices are simpler: discourse about color, communicative expressions of pain, and so on.”<sup>34</sup> Morawetz has few (if any) precursors (although he does make use of H. L. A. Hart’s work, and Ronald Dworkin’s work, as well as Wittgenstein’s) in trying to lay out the features of law as a deliberative discipline. In addition, the sheer complexity of this topic is what makes Morawetz so cautious in his remarks. So, as we follow Morawetz’s development of this theme, along the way we find comments such as the following: “Deliberative practices are characterized both by what binds participants together and what distinguishes them.”<sup>35</sup> And: “Every practice is as simple and as complicated as it needs to be to serve as a tool for organizing experience and proceeding through it.”<sup>36</sup> And, finally, this paradoxical point:

And yet, the very point of deliberative practices seems to be to justify both a particular result and a particular *way* of reaching the result against those who reason differently. Participants have a stake not in a particular set of arbitrary rules but in a particular way of making sense of experience. A deliberative practice is a domain within which such different strategies compete. To give up or alter one’s method of justification is not simply to decide to play by different rules but to decide to see the world differently.

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A deliberative practice is not simply a way of using language or a method of moving from evidence to conclusions. It is a way of being in touch with reality, a way of giving shape and order to experience.<sup>37</sup>

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34. LPLP, p. 92.

35. LPLP, p. 90.

36. LPLP, p. 92.

37. LPLP, pp. 94, 148.

I said earlier that I thought Morawetz had three reasons for wanting to focus on our concept of a practice. I have so far discussed briefly Morawetz's ability to distance his careful analytical work on practices from the standard metaphorical hold (within some readings of a Wittgensteinian perspective) of "game" and "language-game"; and his ability to describe law (or, at least, judicial decision making) in a complicated way as an open, deliberative practice. I now wish to turn to Morawetz's third reason for emphasising his "practice" thematic.

The focus that Morawetz brings to our concept of a practice allows him to draw our attention (following the lead of H. L. A. Hart) to the internal aspect of a practice, and especially on the internal point of view towards law and any legal system (as compared with a variety of possible external points of view). Morawetz goes so far as to say, at the very beginning of his book, that "what Hart calls 'the internal aspect of law' is dauntingly complex and, at the same time, the key to unpacking law as a practice. Traditional antinomies in legal theory can be bridged by an understanding of these complexities."<sup>38</sup>

One "traditional antinomy" in legal theory concerns the apparent dichotomy between insiders who participate in (or believe in) a given legal system, a given system of laws, and outsiders. The generic distinction seems to be that people who participate in a practice have an internal perspective on that practice; they are insiders. But non-participants in the practice – either mere observers of the actions of those people participating in a practice; or theorists who are trying to understand a practice which those theorists do not join or to which they do not adhere – are outsiders, having an external point of view on participating insiders and their practice(s). But, in part because Morawetz gives such detailed attention to discerning and discriminating different kinds of practices (culminating eventually in the complicated category that he calls "deliberative practices"), Morawetz finds that "[t]he distinction between insiders and outsiders (participants and theorists) is clearer in [another person's] model than it is in a deliberative practice."<sup>39</sup> In truth, for Morawetz, with respect at least to deliberative practices and people trying to understand such

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38. LPLP, p. xiii.

39. LPLP, p. 100 n. 73.

practices, this simple dichotomy between internal and external aspects (or, insiders and outsiders) is deceptive and misleading.

Beginning with Hart's discussion of the "internal aspect of rules," Morawetz notes that "[h]ermeneutical self-consciousness about the task of distinguishing internal and external aspects of social and cultural practices has become a characteristic preoccupation in the late twentieth century. Those who examine social practices from a scholarly distance and with the mantle of academic objectivity are typically also participants in such practices. The practices of language and law are obvious examples. Those who study languages also speak them; those who are jurisprudential theorists are also subject to law and have opinions about legal issues. A central question of hermeneutics is how the task of the theorist is affected by her role as practitioner."<sup>40</sup> One way to address this question is exemplified in Morawetz's work. He distinguishes four different senses of the internal/external dichotomy. A person can be said to be external to a given practice in the sense of being (1) a cross-cultural observer; (2) a natural scientist; (3) an outlaw; or (4) a participant in the practice "who fails to apprehend the coherence and systemic nature of [the practice]."<sup>41</sup>

As Morawetz proceeds with his analysis, he draws out three characteristics of a theorist's "attitude" towards some practice towards which he or she has an "external" point of view. Such a theorist is expected to be dissociated from the practice; is expected to offer us generalisations on the practice being studied; and is expected to be critically self-reflective and scrutinising with respect to the practice under study.<sup>42</sup> But these three characteristics – which may seem to give "theorists a privileged position"<sup>43</sup> on the practice they are studying – are nothing more, Morawetz claims, than "distillations or refinements of conceptual moves that insiders [of the practice under study] may also make"<sup>44</sup> in maintaining their distance from a practice in which they are participants. Thus, Morawetz concludes:

These sketches of possible theoretical orientations reflect different points of view that typically coexist not only among theorists but

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40. LPLP, p. 196.

41. LPLP, p. 205. See LPLP, pp. 201–205, for Morawetz's complete discussion of these four senses of being "external" to a practice.

42. See LPLP, pp. 214–216.

43. LPLP, p. 216.

44. LPLP, p. 216.

within a legal system – the point of view of the ordinary citizen, that of the outlaw, and that of the official or decision-maker empowered to interpret, create, and transform the law.<sup>45</sup>

Morawetz is led by this analysis to emphasise “the dependence of theory on practice, [and] the dependence of the external upon the internal aspect of law.”<sup>46</sup>

He summarises this dependency as follows: To the extent that a theorist or other purported “outsider” claims to be able to offer us insiders a special perspective on one of our practices, a perspective supposedly special because it is gained by making oneself (i.e. the outside observer) external to the ways and rules and norms of the examined practice, Morawetz believes that we can attain the same perspective on the same practice from inside, as practitioners or participants. “Autonomy makes sense *within* the practice in the sense that we can exercise autonomy by resisting physical, psychological, and conceptual coercion. We engage in self-questioning, entertaining alternative arguments and points of view. That is how we experience autonomy. But it makes no sense to look for autonomy *from* the practice, any more than it makes sense to seek autonomy from life itself. Being internal to this rich practice is a condition of our being, but that being exists as tension.”<sup>47</sup> Morawetz says that, consequently, “the external point of view of legal theory [is] dependent upon the internal point of view of individuals inside legal practices. . . . To forget this is to indulge that dangerous arrogance of some theorists, those who devalue the role of internal points of view and do so at their peril.”<sup>48</sup>

## II. Jurisprudence after Wittgenstein: Criteria as Characterisations of Concepts and Their Uses

The subtitle of Morawetz’s book indicates that his essays are written in a specific philosophical mode: they are exercises written, or conducted, after the example of Wittgenstein’s later philosophy. But here the term “after” is equivocal, bivalent, because it can mean either

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45. LPLP, p. 221.

46. LPLP, p. 225.

47. LPLP, p. 234.

48. LPLP, p. 234.

that these essays are written subsequent to Wittgenstein's later work (as it were, post-Wittgensteinian studies in the field of Jurisprudence); or that they are written in pursuit of Wittgenstein's later work (taking after it or exemplifying it, following after Wittgenstein's great example). And both meanings make sense in this context.

As these essays move along, passing from the early 1970s into the late 1990s, with their references moving from H. L. A. Hart's work in the 1960s, through Ronald Dworkin's work in the 1970s and 1980s, into the post-modernist and critical legal studies of the late 20th century, the reader gains a sense that Morawetz is dating a period in jurisprudential studies. He puts things together in a way that would not have been possible for someone working and writing in the field of philosophy of law during the 1950s and 1960s. Just as clearly, though, Morawetz's work – in carefully tracing the variegated outcroppings of the concept of a practice; and in exploring the possibility of reconciling disagreements between different conceptual schemes; and in pursuing the similarities and dissimilarities between games and language, and between language and law – is undertaken in admiration of (and out of respect for) the accomplishment of Wittgenstein's later work – and for what that later work has made available to us, those who come after him.

There are, however, more ways than one in which a person might usefully follow Wittgenstein's example. Tom Morawetz's way of pursuing an aspect of Wittgenstein's work<sup>49</sup> consists in building a descriptive account of law (of, i.e., particular legal systems) as open, deliberative practices. Such an account seeks an ever more accurate portrait of the varieties and vagaries of its subject matter (legal phenomena in all their guises). "In aid of what?" (we might ask). Here I would say that I understand Wittgenstein's descriptions of human phenomena – be they aspects of linguistic, legal or other human actions and activities – to be meant to remind us of features of our

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49. This aspect of Morawetz's work – namely, its emphasis on building an accurate and apt description of law as an open, deliberative practice – is, I believe, one basis for Morawetz's remark that jurisprudence as practiced today can be pursued as "a fairly robust enterprise." (See text at footnote 1, *supra*.) A part of what makes this work "robust" is the fact that it is not primarily aimed at the task of deflating "houses of cards" (as Wittgenstein sometimes describes his project [as in §118 of *Philosophical Investigations*]). Rather, Morawetz's work contributes to understanding law by describing, in a philosophically sensitive way, the complexities and ambiguities of any particular legal system (with due consideration for the variety in legal systems as specimens of open, deliberative practices).

conceptual landscape which for some reason we have forgotten or ignored. Wittgenstein's descriptive reminders recall (by recounting) for us a kind of conceptual knowledge ("grammatical" knowledge) which we have shunned. What kind of knowledge is this that we have shunned?<sup>50</sup>

Before I characterise this kind of knowledge that (according to Wittgenstein) we neglect, I want to note that Tom Morawetz gives us one way of understanding Wittgenstein in this regard:

... Wittgenstein is sometimes interpreted as placing the role of philosophy in question and in jeopardy and concluding that philosophy can, at best, be a kind of therapy. It cures us of using terms and arguments outside their natural use in linguistic practices, cures us of asking abstractly about the nature of reality, knowledge, or goodness. It directs us instead to attend to what goes on inside social/linguistic practices and how terms like "real," "know," and "good" acquire meaning through use. If philosophy survives at all, its role is to make us self-conscious about the nature of our practices or "language games" (which have as much to do with how we think as what we say).<sup>51</sup>

Far from objecting to Morawetz's reading of Wittgenstein, I find much in this passage with which to agree. For example, Morawetz's description of Wittgenstein's later work – in emphasising the therapeutic bent of Wittgenstein's later work, as well as that work's constant call upon us "to attend to what goes on inside social/linguistic practices" – seems to me to be on track; it is both accurate and perceptive in leading us towards an understanding of that later philosophy. But in the eventual turn that Morawetz's reading gives the term, "therapy," making it seem a purpose of Wittgenstein's later

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50. A further question is: How have we managed to shun or deny such knowledge of our concepts, such apparently basic and accessible knowledge of the layout of our language?

51. LPLP, p. 234. This paragraph immediately precedes the response of Morawetz's which I have quoted above (and given as the motto of my commentary) in my text at footnote 1.

Further characterisations of Wittgenstein's therapeutic project occur in this same essay by Morawetz ("Law as Experience"), at pp. 199–200 nn. 15 and 17:

"[P]hilosophy (in the way [Wittgenstein] commends and practices it) exposes the snares, the artificial obstacles, for what they are. It is, therefore, a form of conceptual therapy.

...

In other words, 'philosophy' in the criticized sense is fully displaced by philosophy as conceptual and linguistic therapy."

work to psychoanalyse us,<sup>52</sup> his reading of Wittgenstein ultimately fails to bring us into an engagement with certain aspects of Wittgenstein's later philosophy that I wish to find undeniable.

When coupled with the word, "therapy," Morawetz's going on to say that in Wittgenstein "philosophy survives . . . [only in] its role . . . to make us self-conscious about the nature of our practices or 'language games,'" makes it sound as though philosophy's task is one of embarrassing us into acknowledging our individual miscues within our social practices. (It would not be misguided, I believe, to connect such a thought with Socrates' wish to "humiliate" his interlocutors through his dialectical device of *elenchus*.) But on my reading (following Cavell's reading) of Wittgenstein, the matter is one of recalling to our consciousness the recounted facts of our language and of our ways with words (their grammatical connections and criterial relations), which for Wittgenstein prove to be the twin or joint pivots upon which what we say and do make sense. This philosophical task of teaching reminds us of – gets us to recall or to remember, to recount to and for ourselves – the things we already know (in some sense), a knowledge of things that we already have acquired in the process of acquiring and mastering our native tongue.

One way of putting the difference between how Morawetz reads Wittgenstein and how I read Wittgenstein is this: I believe that Morawetz's way of following Wittgenstein's lead leaves out of account Wittgenstein's emphasis upon the element of instruction. If productive philosophical work is to be generated out of a process of therapy, then for Wittgenstein such therapy must take the form of, or consist in, instruction. And this instruction is, again, a matter of our coming to appreciate the range and structure and formation of the criterial schematism that sketches the grammatical connections and relations that inhere in (or, that are embedded in) our language.

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52. It is difficult to maintain a proper balance here in describing Wittgenstein's work. I follow Stanley Cavell's lead in thinking that, properly speaking, Wittgenstein's later philosophy *is* meant to read us (even as we are reading it). But, I should add, the reason that Wittgenstein's work can read us is because of what we share. It is because the personal is formed through what we share (our language, for one thing; as well as our other human inheritances) that such reading – or such therapy, or such psychoanalysis – of ourselves works as and when and how it does work. Whether this view is Freudian, I do not know; but I do believe that it is truly Wittgensteinian.

“[S]o far as philosophy, as in the *Investigations*, conceives of itself as instruction, instruction [is] however in what no one could manage just not to know.”<sup>53</sup>

Wittgenstein’s therapy of instruction suggests that such teaching – such learning – involves re-directing our attention to things we all know and share, matters of what Morawetz calls attending “to what goes on inside social/linguistic practices.” But the focus of Wittgenstein’s re-direction of our attention is, here, not only on what we do and say, but also on (and only because these things reveal) the conceptual structure and framework which we share through inheriting and inhabiting our natural, native language (whatever that particular language may be). This is, in Wittgenstein’s terms, a study in – or instruction in – the grammatical relations and connections that compose our natural, native language. What kind of knowledge is such grammatical knowledge? And how do we gain instruction in something that we, in some sense, already know?

This is the point at which I asked before, “What kind of knowledge is this that we have shunned?” In Stanley Cavell’s early (and still essential) study of Wittgenstein’s later philosophy, Cavell poses a similar question about our knowledge of our everyday, natural language: “But what kind of knowledge is this? What kind of knowledge is the knowledge of what we ordinarily mean in using an expression, or the knowledge of the particular circumstances in which an expression is actually used?”<sup>54</sup> Two pages later, Cavell responds to his own question about our “knowledge of everyday language” with this: “Is this empirical knowledge? Is it a priori? It is a knowledge of what Wittgenstein means by grammar – the knowledge Kant calls ‘transcendental.’”<sup>55</sup> Twenty-five years later, trying to draw upon some of the implications of Cavell’s work and Wittgenstein’s writing for the benefit of jurisprudence, I would myself term this knowledge, “necessary knowledge.”<sup>56</sup>

53. Stanley Cavell, *Cities of Words: Pedagogical Letters on a Register of the Moral Life* (Harvard University Press, 2004), 371.

54. Stanley Cavell, “The Availability of Wittgenstein’s Later Philosophy,” in his *Must We Mean What We Say?* (Charles Scribner’s Sons, 1969), 62 [hereinafter cited as “Availability”]. Originally published at: 71 *Phil. Rev.* 67–93 (January 1962).

55. “Availability,” p. 64.

56. Thomas D. Eisele, “The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities,” 54 *Tenn. L. Rev.* 345, 351 (1987): “Such knowledge is necessary knowledge, or knowledge of necessities, according to Kant and Wittgenstein.”

Realising, as I do, that I can neither defend nor explicate all of the assertions and claims concerning Wittgenstein's later philosophy that have accumulated over the past several pages, at this juncture I shall do what I can to clarify and expand the most fundamental among them. This leads me to consider Wittgenstein's notion of a criterion, and its related notion of grammar. Accordingly, I offer a brief synopsis of Stanley Cavell's version of how criteria relate to grammar in Wittgenstein's later work.<sup>57</sup>

Cavell's early essay on Wittgenstein (cited above) contains the thought that Wittgenstein's later philosophy is based upon "the twin concepts of 'grammar' and of 'criteria.'" <sup>58</sup> How exactly, one might ask, are these two concepts entwined? Cavell there tells us this much:

[W]hat Wittgenstein means when he says that philosophy really is descriptive is that it is descriptive of "our grammar," of "the criteria we have" in understanding one another, knowing the world, and possessing ourselves. Grammar is what language games are meant to reveal; it is because of this that they provide new ways of investigating concepts, and of criticizing traditional philosophy.<sup>59</sup>

What comes out, in due course, is that Cavell considers Wittgensteinian criteria to describe the concepts we have and how we use or employ them; thus, by investigating criteria (which is what, in part, we discover or reveal by means of imagining and describing language-games), we are also (and thereby) investigating our grammar, the conceptual uses and structure that we have gained and that we employ once we inherit (and as we inherit) a natural language.

Support for this reading of criteria and grammar comes both from Wittgenstein's original texts and from Cavell's texts about Wittgenstein's texts. One indication of such ideas in Wittgenstein's work can be found in a passage drawn from *The Blue Book*:

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57. I cannot claim anything like comprehensiveness for this brief account of Cavell's work on Wittgenstein's notion of a criterion. Specifically, I say nothing about the differing roles of criteria in terms of specific or problematic objects and in terms of simple or generic objects (as Cavell calls them in *The Claim of Reason*); nothing about the importance and force in Wittgenstein's later philosophy of the concepts of what we "call" something or what we "count" as something in regard to the criteria we have; and nothing about Wittgensteinian criteria as being the "pivot" (or as being pivotal) between certain necessities (as Cavell terms them in *This New Yet Unapproachable America*). So much is left out of my brief account here.

58. "Availability," p. 56.

59. "Availability," p. 56.

We said that it was a way of examining the grammar (the use) of the word “to know,” to ask ourselves what, in the particular case we are examining, we should call “getting to know.” There is a temptation to think that this question is only vaguely relevant, if relevant at all, to the question: “what is the meaning of the word ‘to know?’” We seem to be on a side-track when we ask the question “What is it like in this case ‘to get to know?’” But this question really is a question concerning the grammar of the word “to know,” and this becomes clearer if we put it in the form: “What do we *call* ‘getting to know?’” It is part of the grammar of the word “chair” that *this* is what we call “to sit on a chair,” and it is part of the grammar of the word “meaning” that *this* is what we call “explanation of a meaning”; in the same way to explain my criterion for another person’s having toothache is to give a grammatical explanation about the word “toothache” and, in this sense, an explanation concerning the meaning of the word “toothache.”<sup>60</sup>

(1) Let us look, initially, at the second half of this quoted statement: “It is part of the grammar of the word ‘chair’ that *this* is what we call ‘to sit on a chair,’ and it is part of the grammar of the word ‘meaning’ that *this* is what we call ‘explanation of a meaning’; in the same way to explain my criterion for another person’s having toothache is to give a grammatical explanation about the word ‘toothache’ and, in this sense, an explanation concerning the meaning of the word ‘toothache.’” Wittgenstein is suggesting that one aspect of the concept of a chair is that we can (and do) use such an object to sit on. Similarly, one aspect of the concept of meaning is that we can (and do) explain the meaning of a word or concept – we give and receive explanations of someone’s meaning (what he or she means by a particular word; what they meant by what they said; etc.). And, of course, sometimes we fail to explain our meaning (or, our attempted explanations of the meaning of a word [or of what someone said] fail, despite our best efforts to the contrary). Wittgenstein then goes on to say, “to explain my criterion for another person’s having toothache is to give a grammatical explanation about the word ‘toothache.’”

For Cavell, the entwining of criteria and grammar, their nexus, comes here. Criteria, in Wittgenstein’s sense (or, as Cavell calls them in *The Claim of Reason*, “Wittgensteinian” or “grammatical” crite-

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60. Ludwig Wittgenstein, *The Blue and Brown Books* (Harper & Row, 1958), 23–24.

ria<sup>61</sup>), help us to understand the grammar of our language (of our words or concepts) by characterising those words and concepts and their uses. It is part of the concept “chair” that we sit on a chair; hence, in our grammar, the concept “chair” is tied to or associated with – and, therefore, the concept “chair” is characterised by – the concept “sit” (or, “sit on”). This is why Cavell says (albeit somewhat cryptically), in summing up one portion of his presentation on Wittgensteinian criteria, “‘Wittgensteinian criteria do not relate a name to an object, but various concepts to the concept of that object.’ I could also have said: They establish the position of the concept of an ‘object’ in our system of concepts.”<sup>62</sup> How do Wittgensteinian criteria do that?

Cavell suggests the following two points, as he makes his way towards the concluding remark about criteria “establish[ing] the position of the concept of an ‘object’ in our system of concepts.” First, Cavell indicates that Wittgensteinian criteria relate a series or a number of words (concepts) to the concept of an object (what Cavell calls a “generic object”). By so relating these words or terms to another word or term (i.e. the concept of a given object), these Wittgensteinian or grammatical criteria are essentially giving us the terms by which we approach these given concepts. “[C]riteria are the means by which we learn what our concepts are.”<sup>63</sup> These associated words are the linguistic or verbal means by which (or, on the basis of which) we come to know and to use the concept in question, the concept sketched and staked out by the terms with which this concept is associated (and by which the concept is characterised). So, for example, Cavell notes: “Where ‘call’ comes in there [in the quotation taken from *The Blue Book*, text at note 60, *supra*], it introduces a phrase in which the word to be explained is used; i.e. it associates a concept with other concepts.”<sup>64</sup> The grammatical criteria of a concept form its conditions of employment and its conditions of intelligibility; its aggregate conceptual associates are the

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61. Stanley Cavell, *The Claim of Reason* (Oxford University Press, 1979), 72 [hereinafter cited as “CR”]: “Wittgensteinian or (as I will now begin calling them) grammatical criteria are not marks or features which require special training or a specialized environment to have mastered, whereas Austinian (non-grammatical) criteria do.”

62. CR, p. 76.

63. CR, p. 16.

64. CR, p. 70.

means by which we both learn (come to know) this concept and use the concept within our lives and our language.

The second point Cavell makes is that our mastery of language depends upon our ability to master the grammatical criteria that are available to us. To speak or to write competently requires a mastery of the conceptual associates of any given concept; correspondingly, such criterial associates serve to characterise the concept(s) with which they are associated.

Again, Cavell gives us an example: "In a Wittgensteinian context, 'call' is related to grammatical criteria and generic objects. The criteria do not relate a name to an object, but, we might say, various concepts to the concept of that object. Here the test of your possession of a concept (e.g. of a chair, or a bird; of the meaning of a word; of what it is to know something) would be your ability to use the concept in conjunction with other concepts, your knowledge of which concepts are relevant to the one in question and which are not; your knowledge of how various relevant concepts, used in conjunction with the concepts of different kinds of objects, require different kinds of contexts for their competent employment."<sup>65</sup> This claim fits with another, related point (made much earlier in *The Claim of Reason*), that "criteria are object-specific."<sup>66</sup> Cavell goes on to note that this point is "familiar enough," and then he elaborates: "what makes a government stable is not what makes a table or a bridge or a relationship or a solution stable."<sup>67</sup>

Stability in a government is defined differently, then, or it means something different than does stability in a table (or stability in a relationship). This insight suggests that, upon investigation (which may mean simply turning something over in our minds, or trying out some language-games), we shall learn that the terms associated with those various concepts will turn out to be crucially different (even if related, or even though related). Then it seems that Cavell is saying that, if ordinary (Austinian) criteria are object-specific, we need to realise that grammatical (Wittgensteinian) criteria are category-specific or concept-specific. Grammatical criteria are specific to – that is, they are characteristic of – the category or concept that they characterise or describe. In this respect, grammatical criteria

65. CR, p. 73.

66. CR, p. 15.

67. CR, p. 15.

define or establish the terms and relations upon which we come to know and use any concept.

If I am reading Cavell correctly, he is emphasising here that Wittgensteinian (or grammatical) criteria do not serve the same role or function as do our ordinary criteria (which Cavell calls “Austinian” criteria). Ordinary, everyday criteria relate a name to an object. In J. L. Austin’s famous discussion, in his “Other Minds” essay, his examples typically involve our ability to identify birds (sometimes bitterns, sometimes goldfinches), and the criteria he cites are usually distinctive markings or specific behaviour or activities of the animals in question. These ordinary criteria allow us to say, “That’s a bittern,” or “There’s a goldfinch in the garden.”<sup>68</sup> Wittgensteinian criteria, however, do not relate a name to an object; rather, they relate one or more concepts to another concept (“chair,” “pain,” “toothache,” “meaning”).

Both being kinds or types of criteria, it is not surprising, I suppose, to learn that in one sense, Wittgensteinian criteria do the “same” thing as ordinary criteria do – i.e. both kinds of criteria relate one thing to another. What Cavell’s analysis or reading of Wittgenstein is meant to emphasise, however, is that in another respect Wittgensteinian criteria differ from ordinary (Austinian) criteria. The difference between these two kinds of criteria is that the kinds of thing that Wittgensteinian criteria relate together are different from the kinds of thing that ordinary, everyday criteria relate together. Ordinary criteria relate names to objects; grammatical criteria relate concepts to another concept. (The similarities and differences between these two types or kinds of criteria help to account for the structure of Cavell’s opening chapter in *The Claim of Reason*, which is significantly built around, first, a tabular list of certain features of the use of ordinary criteria, and then an extended discourse by Cavell on some of the ways in which Wittgensteinian criteria differ from ordinary criteria. Perhaps in explanation of the structure of his opening chapter, Cavell remarks: “the notion of a criterion is an everyday one and . . . Wittgenstein’s account of it, while not exactly the same notion, is dependent upon the everyday one.”<sup>69</sup>)

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68. J. L. Austin, “Other Minds,” in his *Philosophical Papers*, J. O. Urmson & G. J. Warnock (eds.) (Oxford University Press, 1961), 45–54.

69. CR, p. 6.

At this stage I wish to repeat the claim by Cavell quoted earlier: “‘Wittgensteinian criteria do not relate a name to an object, but various concepts to the concept of that object.’ I could also have said: They establish the position of the concept of an ‘object’ in our system of concepts.” In a later work, Cavell returns to this idea of conceptual characterisation, or of criteria as defining conceptual space, and says: “It is my claim for Wittgenstein’s thought, that his criteria are meant not to settle the field of existence . . . but to mark its bourn, say its conceptual space.”<sup>70</sup> Cavell illustrates his claim, brilliantly I think, with an extended example concerning our ubiquitous chair:

“It is part of the grammar of the word ‘chair’ that *this* is what we call ‘to sit on a chair’ . . .” That you use this object *that* way, sit on it *that* way, is our criterion for calling it a chair. You *can* sit on a cigarette, or on a thumbtack, or on a flagpole, but not in *that* way. Can you sit on a table or a tree stump in that (the “grammatical”) way? Almost; especially if they are placed against a wall. That is, you can *use* a table or a stump *as* a chair (a place to sit; a seat) in a way you cannot use a tack as a chair. But so can you use a screwdriver as a dagger; that won’t make a screwdriver a dagger. What can *serve as a chair* is not a chair, and nothing would (be said to) serve as a chair if there were no (were nothing we called) (orthodox) chairs. We could say: It is part of the grammar of the word “chair” that *this* is what we call “to serve as a chair.”

The force of such remarks is something like this: If you don’t know all this, and more, you don’t know what a chair is; what “chair” “means”; what we call a chair; *what* it is you would be certain of (or almost certain of, or doubt very much) if you were certain (or almost certain, or doubt very much) that something is a chair.<sup>71</sup>

For Cavell, we come to learn what the word “chair” means in our language – as well as what a chair is in our world – by coming to know these little things, these seemingly insignificant (or barely significant) facts, about what we say about chairs and how we use chairs. How can this be?

I do not believe that Cavell (or Wittgenstein) ever attempts to offer an explanation for these things. Instead, it is at such a point in

70. Stanley Cavell, *In Quest of the Ordinary: Lines of Skepticism and Romanticism* (University of Chicago Press, 1988), 84–85 [hereinafter cited as “Quest”].

71. CR, p. 71.

these investigations that Wittgenstein tends to bring us to a full stop, to a halt, with what amounts for him to a conclusion, or to an assertion – something fairly rare in Wittgenstein’s later writings. These conclusions or assertions tend to have a revelatory quality; they are cast as epiphanies: “Essence is expressed by grammar.”<sup>72</sup> And: “Grammar tells what kind of object anything is. (Theology as grammar.)”<sup>73</sup> If the nature of some object is expressed by grammar, that is the case only because we learn this grammar by way of, through the means of, the criteria that (partially) constitute the grammar. Our grammatical investigations are (in part) investigations into the criteria we have, which criteria control the concepts we have. Again, on this point, I resort to quoting Cavell for illustration and illumination:

Wittgenstein’s insight, or implied claim, seems to be something like this, that all our knowledge, everything we assert or question (or doubt or wonder about . . .) is governed not merely by what we understand as “evidence” or “truth conditions,” but by criteria. (“Not merely” suggests a misleading emphasis. Criteria are not alternatives or additions to evidence. Without the control of criteria in applying concepts, we would not know what counts as evidence for any claim, nor for what claims evidence is needed.)<sup>74</sup>

To summarise: The grammatical criteria that we have for something’s being a chair are the conceptual characteristics that constitute something’s being a chair in our language, in our world. That we can sit on it like so; that we can arrange it in this way; that we can build it in this fashion; that it can be used with a table, or with a footstool (but, also, in certain specific circumstances, that it can be used *as* a table, or *as* a footstool); that it can be bought and sold (but also given) in certain ways; and so forth. These grammatical criteria are the conceptual characteristics by means of which we know and understand what a chair is (or what a toothache is, or what pain is, or what meaning is). These are the characteristics that form (constitute) the identity of the concept of a chair (or of a toothache). They characterise what a chair (or toothache) is – and, in *this* sense, such

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72. Ludwig Wittgenstein, *Philosophical Investigations* 3rd edition, (G. E. M. Anscombe, trans.) (Macmillan Company, 1968) [hereinafter cited as “PI”], §371.

73. PI, §373.

74. CR, p. 14.

Wittgensteinian or grammatical criteria tell us “what kind of object anything is” (*vide* §373). Such grammatical criteria “express” the nature or “essence” of any kind of object (*vide* §371), because such criteria characterise the concept of the object for which they are grammatical criteria. And this is so regardless of whether or not we are dealing with a real or fake or feigned or mock chair (toothache, pain, etc.). Wittgensteinian criteria do not speak to – and thus they do not settle – the existence or non-existence of any object. These criteria speak to the identity of a generic object, not its existence. Thus, these grammatical criteria are not evidentiary; they are conceptual characterisations.

Criteria are “criteria for something’s being so,” not in the sense that they tell us of a thing’s existence, but of something like its identity, not of its *being* so, but of its being *so*. Criteria do not determine the certainty of statements, but the application of the concepts employed in statements.<sup>75</sup>

(2) So far, I have scanned only the second half of the initial quotation from Wittgenstein on his twin concepts, criteria and grammar (which quotation is drawn from the early pages of his *Blue Book* [see text at note 60, *supra*]). But the first half of the quotation also has its share of interest and importance.

In that stretch of discussion, you may recall, Wittgenstein says that it is a way to examine the grammar of the word “to know,” to ask ourselves (in the particular case we happen to be examining – possibly, some language-game that we may have sketched or imagined) what we should call “getting to know.” Before going on with his answer, however, Wittgenstein immediately allows an obvious objection to be raised to this way of proceeding: “There is a temptation to think that this question [i.e. the question: What in a particular case do we, or should we, call ‘getting to know?’] is only vaguely relevant, if relevant at all, to the question: ‘what is the meaning of the word “to know?”’” The obvious objection, Wittgenstein says, is that this second question seems tangential (at best) to our direct interest in seeking a definition of knowledge. Wittgenstein admits: “We seem to be on a side-track when we ask the question ‘What is it like in this case *to get to know?*’” Yet Wittgenstein thinks not.

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75. CR, p. 45.

“But this [second] question [about “getting to know”] really is a question concerning the grammar of the word ‘to know’ . . .”

My reading of Wittgenstein here is that the seemingly tangential second question (What do we call “getting to know” in a specific case?) is directly relevant to the first, seemingly main, question (What is the meaning of “to know?”) because the second question directs our attention to some of the grammatical criteria of the concept of knowledge. And if we take the time to investigate the second question, to consider various ways of answering it in various cases or contexts (i.e. in various language-games), what we shall end up eliciting will be various grammatical criteria of knowledge.

For example: We may learn that, in some cases, knowledge is something that develops or evolves, that we come gradually to an apprehension or an acquisition, an accession of knowledge, which we sometimes call “getting to know” something. In other (different) cases, of course, knowledge may come to us differently – as a thunderbolt out of the blue, as a revelation. If so, then that too is useful information to have (or to remember), because that too is a characteristic (a criterial characterisation) of the concept of knowledge. We end up learning what knowledge is by building up this collection of grammatical criteria. These criteria are, in this respect, our means towards learning what the concept of knowledge is (what it means).

In a similar mode, late in *Philosophical Investigations*, Wittgenstein remarks:

“The meaning of a word is what is explained by the explanation of the meaning.” I.e.: if you want to understand the use of the word “meaning,” look for what are called “explanations of meaning.”<sup>76</sup>

If we want to understand the grammar, the use, of the word “meaning,” Wittgenstein says, then we are to examine such things as what we call (i.e. our grammatical criteria for) “explanations of meaning” (and, I suppose, we also might consult “claims of meaning,” and “what a word means,” and “denials of meaning,” etc.). All of these connected or associated concepts should, according to Wittgenstein, furnish us with ways of understanding what meaning is, because all of them characterise what we do with the word “meaning” (and

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76. PI, §560.

“mean” or “means”), how we use these words in our various normal, natural language-games. These grammatical criteria characterise the grammatical structure, the use and technique, of claims of meaning and explanations of meaning and denials of meaning, as they take place – find their home – within our daily lives and our everyday, ordinary language.

This image of domesticity, of words and concepts having their place or “home” among the myriad relations and connections that constitute our language, is something to which Wittgenstein appeals in his diagnosis of the illusions to which we sometimes fall prey in philosophy. One example of such an illusion (an illusion of meaning) is sketched, as is well known, in terms of our trying to speak – trying to utter words – outside of the normal, natural language-games in which those very words have (and find) their place, their home. So we find the following remark: “When philosophers use a word – ‘knowledge,’ ‘being,’ ‘object,’ ‘I,’ ‘proposition,’ ‘name’ – and try to grasp the *essence* of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?”<sup>77</sup> When we allow ourselves to speak (or when we find ourselves driven, forced, to speak) outside of our normal, natural language-games, then we are apt to allow ourselves to say something that we do not (and cannot) mean there and then (i.e. where and when and how we have uttered what we said). On such occasions, although we have the illusion of making sense, we are speaking empty, “*outside* of a particular language-game” (as Wittgenstein puts it at one point early in the *Philosophical Investigations*<sup>78</sup>).

This domestic imagery is meant to show us, I believe, that not only our words are tethered to the world by means of the criteria we have for their use and invocation, but also we tether ourselves (our minds and our bodies) to the world through our use and invocation of our words. This is how we humans fashion a haven, a home, an abode, in this heartless world. As our words and concepts are tethered together into the fabric of our language, we too come to share that language – its warp and weave and woof – by tethering ourselves within its medium of expression and understanding and communication. Cavell’s reading of Wittgensteinian criteria emphasises this aspect of our language, for on Cavell’s understanding of this

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77. PI, §116.

78. PI, §47, ¶ d.

matter, the ordinary (our everyday language) is constituted by those grammatical, Wittgensteinian criteria. “You cannot understand what a Wittgensteinian criterion is without understanding the force of his appeal to the everyday (why or how it tells what kind of object anything is, for example); and you cannot understand what the force of Wittgenstein’s appeal to the everyday is without understanding what his criteria are. This is not a paradox; what it means is that what philosophically constitutes the everyday *is* ‘our criteria’ (and the possibility of repudiating them).”<sup>79</sup> In another context (one in which Cavell is referring to what he calls “Wittgenstein’s preoccupation with the ordinary”), Cavell also remarks: “‘our criteria’ . . . articulate the ordinary.”<sup>80</sup> In this sense, then, Cavell’s claim for grammatical criteria is that they comprise the network of language, the labyrinth of language, in which both we and our words (our concepts) find their ordinary, everyday home. “[T]he ordinary [includes] . . . the structure of our criteria and their grammatical relations.”<sup>81</sup>

Cavell has an extended passage where he again brings this aspect of Wittgenstein’s later philosophy to the fore:

For Wittgenstein’s idea of a criterion – if the account of his idea in *The Claim of Reason* is right, as far as it goes – is as if a pivot between the necessity of the relation among human beings Wittgenstein calls “agreement in form of life” (§241) and the necessity in the relation between grammar and world that Wittgenstein characterizes as telling what kind of object anything is (§373), where this telling expresses essence (§371) and is accomplished by a process he calls “asking for our criteria.” If, for example, you know what in the life of everyday language counts as – what our criteria are for – arriving at an opinion, and for holding firmly to an opinion, and for suddenly wavering in your opinion, and trying to change someone’s (perhaps a friend’s, perhaps an enemy’s) opinion of someone or something (of a friend, an enemy, an option), and for having no or a low opinion of something, and for being opinionated, and being indifferent to opinion (that of the public or that of a private group), and similar things; then you know what an opinion *is*. And you will presumably understand why Wittgenstein will say: “I am not of the *opinion*

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79. Stanley Cavell, *This New Yet Unapproachable America* (Living Batch Press, 1989), 51 [hereinafter cited as “NYA”].

80. Stanley Cavell, *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (University of Chicago Press, 1990), 68 [hereinafter cited as “CHU”].

81. CHU, p. 65.

that he has a soul" (p. 178). And he could have said: I am not of the opinion that there is a God, or that the world exists.<sup>82</sup>

This way of proceeding, this method for investigating the grammar of our lives and our language by means of eliciting and consulting the grammatical criteria that we have and use in using the words and concepts we possess for acting in the world (and counting or accounting for or recounting or discounting the world's items and objects and phenomena), holds in Wittgenstein's later philosophy for any word, any concept, we may wish to examine. This procedure is a method of learning; Wittgenstein offers it to us as a way to learn (if we are confused about) what a chair is, or what "toothache" means. We learn, we clarify our confusion, by means of enumerating the grammatical criteria that relate to each such object. (Grammatical criteria, I should add, also and simultaneously relate us to each such concept of an object, even as these same criteria also relate these concepts to our world.) Wittgenstein's method of learning, of investigation, is equally applicable to concepts such as "knowledge" and "meaning" (seemingly matters of somewhat more extended abstraction). The concepts of "knowledge" and of "meaning" are as completely and thoroughly characterised by their associated or connected grammatical criteria, as the concepts of "chair" or of "toothache" or of "pain" are characterised by their associated or connected grammatical criteria.

We can use grammatical criteria to get to know these things, these concepts, and it is in this respect that such criteria help us to learn the "grammar" of the words or concepts that interest us. If Wittgenstein was right in saying, "Grammar tells what kind of object anything is" (§373), then he might have added, "... and grammatical criteria tell us the kind of grammar that any concept or word has." Criteria are our means of access to these concepts, because criteria characterise these concepts and their uses for us (in our native, natural language). Wittgensteinian criteria are, as I understand them (based heavily upon Cavell's explication), conceptual characterisations.

One consequence of such a view of grammatical criteria is that they are misinterpreted if they are seen (or read) as evidentiary.

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82. NYA, pp. 49–50.

Criteria characterise concepts and their uses; but criteria do not empirically prove anything. (To exemplify, to provide a sample, to characterise a concept or its use, is not to offer a proof of anything.) To take Wittgensteinian criteria to be evidence of anything is to misconceive them; it is to take them to be a variant of inductive evidence, or even perhaps as a kind of non-inductive evidence. (One influential canvass of the literature on Wittgenstein's view of criteria is aptly titled, "Non-Inductive Evidence,"<sup>83</sup> just because so many readers of Wittgenstein take criteria to serve some kind of an evidentiary function.) Instead, grammatical criteria serve to characterise what any given concept is, or how it is used.

Thus, the criteria to which Wittgenstein refers or appeals are characteristics, conceptual characterisations; they serve to characterise (to identify) concepts. But, empirically, they do not prove anything. (Wittgensteinian criteria are not used as empirical proofs; but what Wittgenstein called "symptoms" are or could be so used.) This distinction between conceptual characterisation and empirical proof or evidentiary weight is why, I believe, Cavell is led to say, when he is recounting how Wittgensteinian or grammatical criteria differ from ordinary, everyday (Austinian) criteria: "Now the disanalogy here with Wittgenstein's ideas I can put this way. In no case in which he appeals to the application of criteria is there a separate stage at which one might, explicitly or implicitly, appeal to the application of standards. [Such an appeal would be an evidentiary appeal; or would treat criteria as though they were evidence of something.] To have criteria, in his [Wittgenstein's] sense, for something's being so is to know whether, in an individual case, the criteria do or do not apply. If there is doubt about the application, the case is in some way 'non-standard.'"<sup>84</sup>

Much that I have said and quoted in the foregoing pages may be unclear; I cannot do anything now to make any of it more clear. I continue to believe, however, that the stake in it is great for jurisprudence. Let me now turn directly to that stake.

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83. See W. Gregory Lycan, "Non-Inductive Evidence: Recent Work on Wittgenstein's 'Criteria'" 8 *Am. Phil. Q.* 109–125 (1971).

84. *CR*, p. 13.

## III. Holmes as Legal Theorist and as Practitioner

In discussing the distinction between internal views and external views of a practice, Tom Morawetz enjoined us to take caution in our theoretical reflections about any practice, because (he said) “some theorists” are prone “to indulge that dangerous arrogance . . . [which, at the peril of those theorists,] devalue[s] the role of internal points of view” (see text at note 48, *supra*). But what are we to say to a theorist who also is a participant in the practice at issue, and whose remarks – as arrogant as they may seem, or be – are couched as much in practical terms as they are in theoretical terms? How then do we proceed in a critically fair and just way?

Mr. Justice Holmes presents us with such a dilemma, for he once was the leading theoretician of the law (at least, of American law) who is, more than a century later, still read for his insights into the nature of law. And yet Holmes also was a pre-eminent practitioner of the law, one whose insights into the law seem to be based upon a deep and abiding inhabitation of the law; Holmes lived the law as a practice. It will be difficult to criticise Holmes on the ground of inadequacy either with respect to theoretical matters or with respect to his intimate knowledge of practical matters. Still, Holmes’ statements about the law can seem very wrong, quite misplaced. How might we try to understand this jurisprudential fix with the help of Wittgenstein’s later work?

During the course of a lecture to law students (later published as “The Path of the Law”), Mr. Justice Holmes confronts us both as a legal theorist speaking jurisprudentially, and as an experienced legal practitioner whose practicality stands to save his listeners from the folly of studying law in a wasteful way. Here Holmes is undertaking to advise law students, to guide them, in their legal studies. In offering his good guidance, Holmes is drawn to make several characterisations of the law as an object of study and practice. Here is his first characterisation (which opens his lecture): “When we study law we are not studying a mystery but a well known profession.”<sup>85</sup>

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85. O. W. Holmes, Jr., “The Path of the Law,” 10 Harv. L. Rev. 457, 457 (1897) [hereinafter cited as “PL”]. (Morawetz refers to Holmes’ lecture, and to Holmes’ “bad man” caricature, when Morawetz discusses different varieties of external points of view. See LPLP, pp. 202–203 n. 31.)

It would be difficult to conceive a more hard-headed opening line. Its practicality is evident. Holmes' aim to demystify his subject is clear from the beginning. Later, Holmes makes another gesture towards demystifying the law: "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained."<sup>86</sup> Certain legal concepts, such as "rights" and "duties," are "invested with a mystic significance," out of all proportion to the actual sense or significance that "can be assigned" to these concepts. Holmes seeks to remove the mystification.

How are we (as students of Holmes) advised to avoid making the law mysterious? When we study the law, we study a well known object – namely, a profession (which is, I take it, a kind of practice). In this profession or practice, Holmes says, we are apt to become confused if we fail to notice or mark "the confusion between legal and moral ideas." This confusion in our legal terms or concepts will be dissipated to the extent that we are able to "assign" (or "explain") a more precise sense or "significance" to such terms or concepts. Holmes supposes that the precise legal meaning or significance of various terms and ideas in the law does not include any moral connotations or implications. Holmes proposes, therefore, to clarify the law as a practice or profession by ridding legal concepts of their moral counterparts, their moral "look-alikes," by turning law into a strictly scientific study.

The social sciences, as Holmes understands them, are attempts to organise and systematise human behaviour, to make human behaviour more transparent and more predictable. Along these lines, Holmes' first suggestion (as a characterisation of what law as a profession is) is to say that legal thought is a matter of predicting how judges and other legal officials will act in a certain case or situation. "Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalise them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal

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86. PL, p. 462.

import, up to the final analyses and abstract universals of theoretic jurisprudence.”<sup>87</sup>

Holmes’ guidance would have us believe that the basic process of the law, or at least of the lawyer, is all of a piece – it is all “one” – from a lawyer’s statement of his or her case, all the way up to “the final analyses and abstract universals of theoretic jurisprudence.” Lawyers must eliminate unnecessary details (for example, the dramatic details in which a lawyer’s client “clothed” the client’s story to that lawyer), eschewing anything that would tend to complicate our clear-eyed vision of the law. We wish, after all, to make our prophecies of the law, of the law’s application of force, “more precise, and to generalize them into a thoroughly connected system.” This is the social scientific way of understanding the law. (Here we might recall that Morawetz has noticed the element in theorising that calls for generalisations of the theorist’s observations or theories; see text at note 42, *supra*.)

In pressing this description of the law as a profession, Holmes is led to characterise several aspects of the law, as well as the law itself, in similar terms: it seems that everything in the law, according to Justice Holmes, is a matter of the prophecy or prediction of the possible imposition of the state’s monopoly on legitimate force or coercion. Thus, we have from Holmes these various characterisations of the law:

The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.<sup>88</sup>

...  
The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. . . . But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; – and so of a legal right.<sup>89</sup>

...  
I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law. . . .<sup>90</sup>

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87. PL, pp. 457–458.

88. PL, p. 457.

89. PL, p. 458.

90. PL, p. 458.

...  
 The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.<sup>91</sup>

Why is Holmes so drawn to this image of law as prophecy or prediction (i.e. as predictability)? Why is he so enthralled by this way of seeing the law? It is, for Holmes, a matter (as stated above) of clarifying (or avoiding) a common confusion about law; Holmes seeks to avoid our penchant for confusing legal terms with similar sounding (similar looking, but different meaning) moral terms. "I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness."<sup>92</sup> Holmes has a practical reason and a theoretical reason for enforcing this distinction between legal and moral terms.

In practical terms, Holmes is interested in viewing the law in this way because he believes such a view is appropriately business-like, unpretentious (even cynical). Every person (good man, bad man, rich man, poor man), it seems, is interested in avoiding being subjected to the application of the state's monopoly on force or coercion<sup>93</sup>. It is an article of faith for Holmes that we humans are motivated by a desire to avoid state sanctions. It is only practical, then, to view the law in this unpretentious (even cynical) way. "The first thing for a business-like understanding of the matter," Holmes tells us, "is to understand its limits. . . ."<sup>94</sup> The limit to which Holmes is referring here is the line or boundary to be drawn between legal and moral concepts. Again, the practical importance of observing this line or limit seems self-evident:

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91. PL, p. 461.

92. PL, p. 459.

93. Holmes explains his position in these terms:

You can see very plainly that a bad man has as much reason [motivation] as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

94. PL, p. 459.

I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man [i.e. a practical person], who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright.<sup>95</sup>

The practical reason for observing this line between legal and moral terms is the fact that, if we consider all of the people within a legal system, subject to its dictates, then some fraction or percentage of those people will be what Morawetz calls “outlaws” or “outsiders” – Holmes’ paradigmatic “bad man.” And these people care only for the material consequences of obeying or violating the law.<sup>96</sup> Other people subject to the same legal system will, of course, have an “insider” and “internal” perspective on the law – they obey the law because of the dictates of their conscience, or because these other people take law to have some sort of a normative hold on them. But *all* of the people involved in a legal system – whether they

95. PL, p. 459.

96. Holmes harps upon this point time and again during his lecture. See, e.g. PL, p. 461:

Take again a notion which as popularly understood is the widest conception which the law contains – the notion of a legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.

And PL, p. 461:

If it matters at all, still speaking from the bad man’s point of view, it must be because in one case and in the other some further disadvantages, or at least some further consequences, are attached to the act by the law.

And PL, pp. 460–461:

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, “What constitutes the law?” You will find some text writers telling you that it is something different from what is decided by the courts . . . , that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do. I am much of his mind.

view the legal system as outsiders or as insiders – will have, at a minimum, the object of avoiding the application of the state's force to themselves.

Holmes' "bad man" standard for legal behaviour seems very practical then; it gauges or measures the lowest common denominator in terms of people's motivation for following the law. "I do say that that distinction [i.e. the distinction between law and morals] is of the first importance for the object which we are here to consider – a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines."<sup>97</sup>

Now what of the "theoretical importance of th[is] distinction," which Holmes said was "no less [important], if you would reason on your subject" correctly? About this, Holmes says:

The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.<sup>98</sup>

One could, reading this last statement, imagine that it anticipates Wittgenstein in his concern, throughout his later work, for the influence that language has upon us. To declare that "phraseology drawn from morals" tricks us, or bewitches us, to "pass from one domain to the other without perceiving it," is surely compatible with the Wittgensteinian image of our battling for the sake (or the stake) of our intellects with the bewitchments we find in language.<sup>99</sup> And to say that, "by the mere force of language," we are continually invited to pass unknowingly from the legal domain to the moral domain in the meanings or senses that we ascribe to certain terms used in both the law and morality – something which it seems that "we are sure to do unless we have the boundary [between law and morality] constantly before our minds" – is very similar to Wittgenstein's repeated injunctions that a picture is holding us captive, and that language repeats this picture to us inexorably.<sup>100</sup>

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97. PL, p. 459.

98. PL, pp. 459–460.

99. See PI, §109.

100. See PI, §115.

Holmes concludes: “Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”<sup>101</sup> So what is Holmes’ theoretical solution for this problem, this threatened confusion? How would Holmes bring clarity to this situation? He has a modest proposal:

I hope that my illustrations have shown the danger, both to speculation [i.e. theory] and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.<sup>102</sup>

Earlier in his lecture, Holmes had sketched how this process of “ridding ourselves of an unnecessary confusion” would enable us to “gain very much in the clearness of our thought.” There he had said: “You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.”<sup>103</sup> “But,” Holmes adds in a forlorn tone, “such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”<sup>104</sup>

Mr. Justice Holmes wants to study law by isolating it as the item or object of our attention, thereby intentionally excluding all of the law’s relations from its others (other practices, other phenomena, other concepts). Wittgenstein might, I believe, rather suggest that we try to learn about the law through tracing its relations and connections (with other practices, other phenomena, other concepts). Morawetz follows Wittgenstein’s lead by tracing the law’s relations with other practices; I am more inclined to follow Wittgenstein’s lead by tracing the law’s relations with other concepts.

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101. PL, p. 460.

102. PL, p. 464.

103. PL, pp. 461–462.

104. PL, p. 462.

Here are a few ways in which a Wittgensteinian approach to reading Holmes' "Path of the Law" might help us understand better what law is and our relations with law.

First, Holmes' repeated attempts to draw a line showing the ambit of the concept of law, as well as his frequently expressed wishes to sketch a clear "limit" or "boundary" for the concept of law, thereby making that concept more precise and less vague, seem to me to express a desire to fulfil a fantasy of what the concept of law (or any concept of a similarly complex phenomenon) is like, or of what such a concept can be like. Its grammar is apt not to fit so neatly within a line or limit or boundary, no matter what the vanity of human wishes and desires may be. Wittgenstein said: "If . . . you wish to give a definition of wishing, i.e. to draw a sharp boundary, then you are free to draw it as you like; and this boundary will never entirely coincide with the actual usage, as this usage has no sharp boundary."<sup>105</sup> Holmes' project seems to me to be similarly doomed to fail. It cannot be done.

Second, to the extent that Holmes advises us, or his student audience, to ignore the conceptual associations that the concept of law has (associations, for example, that it may have with, among other things, the concept of morality or other moral concepts), Holmes is telling us to ignore the very conceptual relations and connections – the grammatical criteria – that can inform us about the nature of the concept of law. "When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things."<sup>106</sup> This advice misconceives at a stroke how we might ever achieve a more clear understanding of the concept of law. In effect, this Holmesian advice exemplifies the shunning of our knowledge to which I referred earlier in my discussion of Wittgenstein's later work.

All of Holmes' claims concerning the increased clarity of understanding of the law that we shall gain, and the increased precision of the concept of law itself that shall be gained, if only we forsake its conceptual ties and associations with moral concepts, read to me as claims of the traditional sceptic shunning the grammatical criteria that we have for controlling the flexibility and the stability of

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105. Wittgenstein, *The Blue Book*, *supra* note 60, p. 19.

106. PL, p. 459.

our concepts. Holmes wants us to rid ourselves of these criteria because they complicate (he says, they confuse) our understanding.

Similarly, Holmes' modest proposal that "every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law," expresses a fantasy. We would thereby lose the conceptual relations and connections that keep our concept of law balanced. Of course, from Holmes' perspective, that seems small loss indeed: "We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought" (see text at note 102, *supra*). Would that it were true. The "fossil records," the "ethical associations," the "unnecessary" complexity or confusion of terms – all of these are another way of naming the grammatical criteria that we have for guiding ourselves and our concepts through this complicated world and this complicated form of life of ours.

Wittgenstein's idea of a criterion [is used by Wittgenstein] . . . in connection with his idea of grammar, to describe, in a sense to explain, how language relates (to) things, how things fall under our concepts, how we individuate things and name, settle on nameables, why we call things as we do – questions of how we determine what *counts* as instances of our concepts, this thing as a table, that as a chair, this other as a human, that other as a god. To speak is to say what counts.<sup>107</sup>

Holmes is only doing what good lawyers and good judges so often try to do through the medium of the law and our legal system: he is trying to reduce the vagueness of ordinary life, trying to do away with its terrible unpredictability. But this cannot be done, as much as lawyers and judges (and philosophers, and teachers) may wish or fantasise that it can be done. How does Cavell put it?

[W]hat happens to the philosopher's concepts is that they are deprived of their ordinary criteria of employment (which does not mean that his words are deprived of meaning – one could say that such words have nothing *but* their meanings) and, collecting no new ones, leave his concepts without relation to the world (which does not mean that what he says is false), or in terms I used earlier, remove them from their position among our system of concepts.<sup>108</sup>

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107. Quest, p. 86.

108. CR, p. 226.

Jurisprudence after Wittgenstein, at least in terms of how I relate myself to this philosophical tradition, wishes to contest this shunning of our criteria for the employment of our concepts.

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